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Bank, N.A., sued as "Wells Fargo, N.A." f/k/a
Wachovia Mortgage, FSB and f/k/a World Savings
Bank, FSB ("Wachovia")

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

JOHN H. GIORDANO and GEORGANA G.
GIORDANA,

Plaintiffs,

vs.

WACHOVIA MORTGAGE, FSB: WELLS
FARGO, N.A.; ETS SERVICES, LLC and DOES
1 to 100, inclusive,

Defendants.

Case No.: CV10-4661-JF (PVT)

(Hon. Jeremy Fogel)

WACHOVIA'S REPLY IN SUPPORT OF
ITS MOTION TO DISMISS AND
MOTION TO STRIKE PLAINTIFFS'
FIRST AMENDED COMPLAINT

Date: March 25, 2011

Time: 9:00 a.m.

Crtrm: 3

Defendant Wachovia Mortgage, a division of Wells Fargo Bank, N.A., sued as "Wells
Fargo, N.A.", f/k/a Wachovia Mortgage, FSB and f/k/a World Savings Bank, FSB ("Wachovia"),
respectfully submits this brief Reply in support of Wachovia's Motion to Dismiss and Motion to
Strike Plaintiff's First Amended Complaint:

1. INTRODUCTION

As an initial matter, Plaintiffs' Opposition should be disregarded by the Court because it is extremely late, and Wachovia's Motion to Dismiss and Motion to Strike Plaintiffs' First Amended Complaint should be granted in its entirety. Should the Court nonetheless consider Plaintiffs' tardy Opposition, Wachovia respectfully submits this Reply for consideration.

Wachovia filed its Motions on January 19, 2011, noticing their hearing for March 25, 2011. Pursuant to Local Rule 7-3(a), Plaintiffs' Opposition was due 21 days beforehand, or March 4. Plaintiffs' Opposition was not filed until March 15, or 11 days late. Nor does Plaintiffs' counsel appear to have excusable neglect for missing the filing deadline by nearly 2 weeks. Specifically, on March 3, 2011, Plaintiffs' counsel filed a motion to withdraw as counsel. (Docket No. 41). Plaintiffs' counsel also has previously filed a timely opposition brief to the Motion to Dismiss the original complaint.

Plaintiffs' late Opposition also does not save their case. Plaintiffs argue that their first claim for financial elder abuse is not preempted nor time-barred. (Oppn. § B). Plaintiffs also concede that their UCL claim is purely derivative of their elder abuse claim. (Oppn., p. 4:27-28).

As detailed below, Plaintiffs' elder abuse claim fails to state a claim and therefore, Plaintiffs' 2 claims for relief should be dismissed with prejudice. As well, Plaintiffs did not oppose Wachovia's Motion to Strike. Accordingly, Wachovia respectfully requests that the Motion to Strike be granted in its entirety, regardless of the outcome of the Motion to Dismiss.

2. PLAINTIFFS' ELDER ABUSE CLAIM IS PREEMPTED, FLAWED AND TIME-BARRED

Plaintiffs' elder abuse claim seeks to impose a duty to orally explain a subject loan's terms (Oppn, p. 5:23-24) and Plaintiffs' allege that such a duty to explain arises even though they concede that Wachovia "did not broker the loan." (Oppn., p. 6:03).

First of all, Plaintiffs completely fail to refute the numerous signed-for loan disclosures that Plaintiffs received and was part of Wachovia's Motion to Dismiss. (MTD, p. 1:15-3:06). Plaintiffs could point to no specific loan term which they were misrepresented to. (*See* Oppn). Instead, Plaintiffs seeks to impose a burdensome duty of orally explaining the loan's terms to

1 Plaintiffs – due to their age. (Oppn., p.2:02-3 (age) & p. 2:22 (“These features were not
2 explained to Plaintiffs...”).

3 A. Plaintiffs’ Elder Abuse Claim is Preempted

4 First of all, Plaintiffs’ claim is preempted by HOLA, because it seeks to impose an
5 additional duty of oral explanation on Wachovia’s mortgage “origination” practices, specifically
6 impacting Wachovia’s “disclosure[s]” including “requiring specific statements, information or
7 other content...” that would necessarily come from a duty to orally explain a loan’s terms. As a
8 result, Plaintiffs’ elder abuse claim, as pled, is preempted by 12 C.F.R. § 560.2(b)(9)(“disclosure”
9 and “specific statements, information or content”) and (b)(10)(“origination ... in mortgages”).

10 Tellingly, Plaintiffs cite no case holding that an elder abuse claim is i) not preempted; and
11 ii) that their elder abuse claim is substantially similar to the upheld claim. In fact, Plaintiffs’ elder
12 abuse claim in their FAC is substantively identical to the same claim in their initial complaint,
13 which the Court had already found to be preempted. (Docket No. 31, p. 8:28). *See also Cosio v.*
14 *Simental*, 2009 U.S. Dist. LEXIS 8385, *12-13 (C.D. Cal. 2009); *Bassett v. Ruggles*, 2010 U.S.
15 Dist. LEXIS 37666, *57 (E.D. Cal. 2010)(both finding elder abuse claims to be preempted).

16 B. Plaintiffs’ Agency Theory is Legally Erroneous

17 Plaintiffs attempt to escape the preemption of the elder abuse claim, and the effect of the
18 written disclosures, by alleging that Wachovia owed them a duty to “explain” the Loan’s terms,
19 because Plaintiffs were elderly and that Wachovia was “their agent.” (Oppn. p. 2:22).

20 However, Plaintiffs admit that their duty to explain and agency theory stem from case law
21 on “brokering a loan for a borrower...” (Oppn., p. 5:26-6:06). Plaintiffs then show that their
22 agency theory (and elder abuse claim) is fatally flawed by admitting that Wachovia “did not
23 broker the loan.” (Oppn., 6:03). Without such a duty, Plaintiffs’ theory that Wachovia was
24 obligated to “explain” the terms of their Loan cannot succeed.

25 Indeed, a lender does not owe a duty of care, nor the fiduciary duty of a loan broker, to a
26 borrower. *Nymark v. Heart Fed. S&L Assn*, 231 Cal.App.3d 1089, 1093 fn. 1 (1991)(no duty of
27 care or fiduciary duty). *See also Perlas v. GMAC Mortgage, LLC*, 187 Cal.App.4th 429, 436
28 (2010)(“A lender is under no duty to determine the borrower’s ability to repay the loan.”).

On point and instructive is again *Cosio*, where the plaintiff alleged that co-defendants of the lender, and pled as lender's agents (but acting as a loan broker), failed to fully disclose the terms of her loan and sued for elder abuse. The Court there held in the lender's motion to dismiss: "Lastly, to the extent that other defendants failed to properly disclose required information, § 560.2(b)(9) applies." *Id.* * 14. Here, there is only Wachovia and no co-defendants; the case for preemption and lack of duty to explain loan terms is even clearer.

C. Plaintiffs' Elder Abuse Claim is Also Time-Barred.

Although Plaintiffs plead that they were handed a huge stack of documents to sign (and apparently did not read any of them which do not make them any less enforceable (*King v. Larsen Realty, Inc.*, 121 Cal. App. 3d 349, 358 (1981))), Plaintiffs plead no facts to show why they did not review the documents a few days after closing. As a reminder, Plaintiffs attached copies of the Note, deed of trust and prepayment acknowledgment to their initial Complaint.

This lack of diligence, not reading the loan documents after closing, does not toll their disclosure-based actions, such as Plaintiffs' pled elder abuse claim. *See Gomez v. Wachovia Mortg. Corp.*, 2010 U.S. Dist. LEXIS 3799 * 13 (N.D. Cal. 2010)(J. Armstrong presiding) ("Plaintiff did not allege . . . circumstances that served to prevent her - in the exercise of all due diligence - from having the documents translated into Spanish. . . . Consequently, the Court finds that the doctrine of equitable tolling does not apply to Plaintiff's TILA claim and is therefore time-barred."). *See also Meyer v. Ameriquest Mortg. Co.*, 342 F.3d 899, 902 (9th Cir. 2003)("The Meyers have produced no evidence of undisclosed credit terms, or of fraudulent concealment or other action on the part of Ameriquest that prevented the Meyers from discovering their claim.")(emphasis added).

The diligence required here, simply reading the loan documents, is much, much lower than having the loan documents translated into Spanish as in *Gomez*, and the case for Plaintiffs' claim being time-barred is even clearer. The "exercise of reasonable diligence" requirement is also in Welfare & Institutions Code § 15657.7, which was not even in effect at the time Plaintiffs' claim became time-barred, also time-bars Plaintiffs' elder abuse claim.

For all these reasons, Plaintiffs claims should be dismissed with prejudice.

1 **3. PLAINTIFFS SHOULD NOT BE GIVEN LEAVE TO AMEND**

2 Plaintiffs were already afforded one opportunity to amend and essentially re-alleged their
3 elder abuse claim, which for the reasons stated above, is preempted, flawed and time-barred.
4 Plaintiffs' UCL claim is purely derivative (Oppn., p. 4:27-28) and fails for those same reasons.
5 Plaintiffs, represented by counsel, should not be given yet another chance to amend.

6 Moreover, since the terms of the Loan were laid out in detail in numerous signed
7 disclosures, Exhibits A-E to the RJN (authenticity of which are not disputed by Plaintiffs), any
8 misrepresentation as to a loan term, different from what is in writing, would not be actionable in
9 any event. *Davis v. Gulf Oil Corp.*, 572 F. Supp. 1393, 1400-1401 (C.D. Cal. 1983) held:

10 The parol evidence proposed by plaintiff would 'flatly contradict' the terms of the
11 contract, and the Court concluded that the extrinsic evidence should not have been
12 admitted. This holding is consistent with the longstanding rule in California that
fraud cannot be proven by a promise that is 'directly at variance with the promise
of a writing.'

13 quoting *Bank of America NT v. Pendergrass*, 4 Cal.2d 258, 263 (1935)(emphasis added).

14 Accordingly, Wachovia's Motion to Dismiss should be granted with prejudice.

15 **4. THE MOTION TO STRIKE SHOULD BE GRANTED IN ITS ENTIRETY**

16 Finally, Plaintiffs do not even bother to oppose the Motion to Strike, and for the reasons
17 stated therein, the punitive damages allegation and prayer should be stricken.

18 **5. CONCLUSION**

19 For all the foregoing reasons, Wachovia's Motion to Dismiss and Motion to Strike
20 Plaintiffs' First Amended Complaint should be granted in their entirety.

21 Respectfully submitted,

22 Dated: March 15, 2011

23 ANGLIN, FLEWELLING, RASMUSSEN,
24 CAMPBELL & TRYTTEN LLP

25 By: /s/ Yaw-Jiun Wu
26 Yaw-Jiun (Gene) Wu

27 Attorneys for Defendant
28 Wachovia Mortgage, a division of Wells Fargo
Bank, N.A., sued as "Wells Fargo, N.A." f/k/a
Wachovia Mortgage, FSB and f/k/a World
Savings Bank, FSB

CERTIFICATE OF SERVICE

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of Pasadena, California; my business address is Anglin, Flewelling, Rasmussen, Campbell & Trytten LLP, 199 S. Los Robles Avenue, Suite 600, Pasadena, California 91101-2459.

On the date below, I served a copy of the following document(s):

**WACHOVIA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS AND MOTION
TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT**

on all interested parties in said case addressed as follows:

Served Electronically via Court's CM/ECF System:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. This declaration is executed in Pasadena, California, on **March 15, 2011**.

Wendy Mutum
(Print name)

/s/ Wendy Mutum
(Signature)